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First report on State responsibility

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Addendum

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II. Review of draft articles in Part One (other than article 19) (continued)

C. Part One, Chapter II: The "act of the State" under international law (articles 5-15)

1. Introduction

144. This part of the report examines and makes proposals on chapter II (articles 5-15) of the draft articles. It first deals with issues of terminology, outlines the general comments of Governments on chapter II as a whole, and identifies certain general principles (see paras. 145-159). It then reviews in turn each of the articles, taking into account, in particular, the comments and observations of Governments, as well as proposing one additional article (paras. 160-286). Finally, the proposed articles are set out with brief explanatory notes (para. 287).

145. Chapter II defines the conditions in which conduct (acts or omissions of human beings or of other entities) is attributable to the State under international law, something which has already been specified as an essential requirement for the internationally wrongful act of a State under article 3 (a). It is plainly central to the definition of State responsibility.

146. Chapter II consists of 11 articles, in three groups. Five articles specify the circumstances in which conduct is attributable to the State (articles 5, 7, 8, 9 and 15). They apply in the alternative; that is to say, conduct is attributable to the State if any one of the articles is satisfied. The first group of articles is subject to certain clarifications, provided for in articles 6 and 10. Finally, four articles state the circumstances in which conduct is not attributable to the State (articles 11, 12, 13, 14). In accordance with article 3 (a), however, it is a necessary condition for State responsibility that conduct is actually attributable to the State. Strictly speaking, it is not necessary to say when conduct is not attributable, except to create an exception to one of the clauses providing for attribution. None of the "negative" articles creates such an exception.

147. There is a measure of duplication. The conduct of organs of other States is dealt with in articles 9 and 12 (article 28, paragraph 1 might also be characterized as a rule of attribution). The conduct of international organizations is dealt with in articles 9 and 13. The conduct of insurrectional movements is dealt with in articles 14 and 15. The relation between these provisions requires consideration.

148. Some of these articles have been frequently referred to in judicial decisions and in the literature. In addition, there have been major developments in the law of attribution, in decisions of the International Court of Justice and of other international tribunals, including

the Iran-United States Claims Tribunal[1] and the various human rights courts and committees.[2] These developments will need to be carefully taken into account.[3]

149. Before turning to the individual articles, a number of general issues about chapter II as a whole need to be mentioned.

(a) Questions of terminology

150. When he first proposed this group of articles, Special Rapporteur Ago used the term "imputability",[4] which is also common in the literature. The same term has been used by the International Court in later cases.[5] The Commission itself, however, preferred the term "attribution", to avoid any suggestion that the legal process of connecting conduct to the State was a "fiction".[6] The State *can* act only through individuals, whether those individuals are organs or agents or are otherwise acting on behalf of the State. In the words of one author: "Imputability implies a fiction where there is none, and conjures up the idea of vicarious liability where it cannot apply".[7] For these reasons, it is suggested that the term "attribution" should be retained.

151. The title of chapter II rather awkwardly places inverted commas around the phrase "act of the State", which also tends to recall the distinct notion of "act of State" current in some national legal systems. A more informative title might be preferable, such as "Attribution of Conduct to the State under International Law"; this would have the further advantage of corresponding exactly to the language of article 3 (a). Of course, under article 3, the rules of attribution are established for the purposes of the law of State responsibility; different rules of attribution exist, for example, for the purposes of the law of treaties.[8] This point is conveyed by the words "For the purposes of the present articles" in article 5, and is reinforced in the commentary.[9]

(b) Comments of Governments on Chapter II as a whole

152. A number of government comments relate to the balance and structure of Chapter II as a whole.

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[1] For a thorough account of issues of attribution before the Claims Tribunal see D. Caron, "The Basis of Responsibility: Attribution and other Trans-substantive Rules" in R. B. Lillich and D. B. Magraw, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) pp. 109-184 (hereinafter Caron). See also C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (1998) pp. 442-456; G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) pp. 174-215; A. Avanessian, *The Iran-United States Claims Tribunal in Action* (1993), pp. 209-233.

[2] Usefully reviewed by H. Dipla, *La responsabilité de l'Etat pour violation des droits de l'homme – problèmes d'imputation* (1994) (hereinafter Dipla).

[3] For the extensive literature on attribution see the Bibliography, *infra*.

[4] See his second report, *Yearbook of the International Law Commission*, 1972, vol. 2, pp. 187-89.

[5] *United States Diplomatic and Consular Staff in Tehran, ICJ Reports* 1980, p. 3, e.g., at p. 29; *Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports* 1986, p. 14, e.g., at p. 51 (para. 86). Judge Ago was a member of the majority on both occasions.

[6] See Ago, third report. *Yearbook* ... 1971, vol. 2 (Part One), p. 216.

[7] I. Brownlie, *State Responsibility. Part I* (1983), p. 36.

[8] See Vienna Convention on the Law of Treaties, 1969, arts. 7, 8, 46, 47, 50, 51. Similarly the identification of State organs or instrumentalities for the purposes of State responsibility is not necessarily the same as it is for the purposes of foreign State immunity. For the latter, see the Commission's Draft Articles on the Jurisdictional Immunities of States and their Property (1991), art. 2 (1) (b) and commentary: *Yearbook* ... 1991, Vol. II (Part Two), pp. 14-19.

[9] Commentary to part one, chapter II, para. (5).

153. Germany doubts whether this chapter "sufficiently covers acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as State organs but nevertheless act under the authority and control of the State ... States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State".[10] It notes, however, the element of flexibility introduced by article 7, paragraphs 2 and 8.

154. A similar concern may underlie the comment of France with regard to article 5, that "The term 'State organ' is too restrictive. It would be better to use the expression 'any State organ or agent'. The same comment applies to articles 6, 7, 9, 10, 12 and 13."[11]

155. Mongolia also expresses ...

> "some doubts as to the coverage of acts of natural persons, who, at the time of committing a violation of international law, do not act as State representatives but nevertheless act under the authority and control of the State. In this connection mention should be made of the trend towards [a] broader understanding that under customary international law, as applied to environmental protection, a State is responsible for its own activities and for those of persons, whether they be individuals, private or public corporations, as long as their activities are under the State's jurisdiction or control."[12]

156. The United Kingdom of Great Britain and Northern Ireland calls on the Commission "to consider whether an effective criterion of 'governmental' functions can be devised and incorporated" in this chapter. It calls attention, in particular, to religious bodies which may exercise some degree of state authority (e.g. to punish persons for breaches of religious law) while not formally part of the governmental structure.[13]

157. As a matter of drafting, Switzerland and the United States doubt the wisdom of a technique which first specifies which acts are attributable (articles 5-10), and then specified acts which are not (articles 11-14): this leads in their view to excessive complexity.[14] In its 1981 comments, the Federal Republic of Germany likewise called for the consolidation of any useful elements of articles 11-14 into the other, positive, provisions of chapter II.[15]

(c) Basic principles underlying the notion of attribution

158. Before turning to the specific articles in chapter II, it is useful to call attention to the basic principles which underlie the notion of attribution:

> *Limited responsibility of the State.* Under international law, the fact that something occurs on the territory of a State, or in some other area under its jurisdiction, is not a sufficient basis for attributing that event to the State, or for making it responsible for any injury caused.[16] A State is not an insurer in respect of injuries occurring on its territory; it is only responsible if the conduct in question (a) is attributable to it and (b) involves a breach of an international obligation owed by the State to persons or entities injured thereby (see article 3).

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[10] A/CN.4/488, p. 36.

[11] Ibid.

[12] Ibid., p. 40.

[13] Ibid., p. 37.

[14] See Switzerland, ibid., p. 37; United States, ibid., p. 41.

[15] *Yearbook* ... 1981, vol. II (Part One), p. 74.

[16] As the International Court noted in the *Corfu Channel Case*, *ICJ Reports* 1949, p. 4 at p. 18. See below, para. 253.

Distinction between State and non-State sectors. Thus the rules of attribution play a key role in distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility. However this immediately confronts the difficulty that international law does not determine the particular structures of government within States.[17] Many activities carried out by Governments could be entrusted to the private sector, and the line between public and private varies continually over time within and between different countries. Without a fixed prescription for State authority, international law has to accept, by and large, the actual systems adopted by States, and the notion of attribution thus consists primarily of a *renvoi* to the public institutions or organs in place in the different States.[18]

The "unity of the State". On the other hand, international law makes no distinction between different components of the State for the purposes of the law of responsibility, even if the State does so, for example, by treating different organs as distinct legal persons under its own law. The relevant international principle is that of the "unity of the State".[19] In this respect, the process of attribution is an autonomous one under international law, as stipulated in article 4.[20]

Lex specialis. The principles of attribution under international law are not, however, overriding. States can by agreement establish different principles to govern their mutual relations, and the principle of *lex specialis* accordingly applies to chapter II in its entirety.[21]

Distinction between attribution and breach of obligation. Under article 3, State responsibility requires both that the conduct be attributable to the State and that it involve a breach of an international obligation of the State. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the cumulative effect of the principles of attribution make it essential in each case to articulate the precise basis of any claim. For example, a State may not be responsible for the acts of private individuals in seizing an embassy, but it will certainly be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In that respect, there may be a close link between the basis of attribution and the particular primary rule which is said to have been breached, even though the two elements are analytically distinct.

159. In summary, attribution is a necessary condition for State responsibility. A State is not responsible for conduct unless that conduct is attributable to it under at least one of the "positive attribution" principles. These principles are cumulative, but they are also limitative. In the absence of a specific undertaking or guarantee (which would be *lex specialis*), a State is not responsible for the conduct of persons or entities in any circumstances not covered by articles 5, 7, 8, 9 or 15. In many cases, it will be obvious from

[17] The main exception to this generalization is in the field of the administration of justice, especially criminal justice. Both international human rights law and the older institution of diplomatic protection require that there be independent tribunals established by law and operating in accordance with certain minimum standards.

[18] This does not, however, limit the scope of obligations States may undertake, including obligations relating to the "non-State sector". See e.g. *X & Y v The Netherlands* ECHR Ser. A, vol. 91 (1985).

[19] As noted by Chile in its comments of 9 October 1979: *Yearbook* ... 1980,vol. II, (Part One), p. 96.

[20] See the commentary to chapter II, para. 6 ("The attribution of an act to a State in international law is wholly independent of the attribution of that act in national law").

[21] See above, para. 27, where it is suggested that article 37 (*lex specialis*) be made applicable to the draft articles as a whole.

the first that the State is involved, for example, where the injury flows directly from a law, a governmental decision or the determination of a court. But where there is doubt it will be for the claimant to establish attribution, in accordance with the applicable standard of proof, in the same way as the claimant will have to establish that there has been a breach of obligation.[22] This follows already from the provisions of article 3.

2. Review of specific articles

(a) Article 5: Attribution to the State of the conduct of its organs

160. Article 5 specifies what might be called the "primary" rule of attribution:

> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

161. Article 5 needs to be read systematically, in the context of the articles of chapter II as a whole. Article 6 makes it clear that State organs may belong to the constituent, legislative, executive, judicial or any other branch of government, that they may exercise international functions or functions of a purely internal character, and that they may be located at any level of government, from the highest organs of state to the most subordinate. Article 10 indicates that an organ may act in its capacity as such, notwithstanding that it "exceeded its competence according to internal law or contravened instructions concerning its activity".

162. The commentary to article 5 makes no attempt to define an "organ", although it is clear that the term is used in its broadest sense to mean a person or entity constituting part of the Government and performing official functions of whatever kind and at whatever level. The breadth of the notion is further emphasized in article 6. The commentary does, however, distinguish between "organs" and "agents", on the basis that ...

> "it was agreed that the article should employ only the term "organ" and not the two terms "organ" and "agent". The term "agent" would seem to denote, especially in English, a person acting on behalf of the State rather than a person having the actual status of an organ. Actions or omissions on the part of persons of this kind will be dealt with in another article of this chapter."[23]

Article 8 deals with "agents", although it does not use that term.

Comments of Governments on article 5

163. As already noted, France suggests that the term "any State organ or agent" be substituted in article 5 and elsewhere.[24]

164. The United Kingdom queries whether this article does not give excessive weight to the State's municipal law:

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[22] This proposition has been repeatedly reaffirmed. See e.g., *Yeager v Islamic Republic of Iran* (1987) 17 Iran-United States Claims Tribunal 92 at pp. 101-2: "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".

[23] Commentary to article 5, para. (13).

[24] A/CN.4/488, p. 36.

> "If that law itself designates the organ as an organ of the State, it may be appropriate for international law to adopt a similar position. If, however, the municipal law of a State does not treat an organ as part of the State, it does not necessarily follow that the organ's acts are not attributable to the State. The municipal law cannot have determinative effect in this context: attribution is a matter for international law."[25]

165. The United States of America is strongly of the same opinion. It draws attention to a perceived conflict between articles 4 and 5 in this respect, and suggests that:

> "the internal law loophole in article 5 effectively creates the possibility for a wrongdoing State to plead internal law as a defence to an unlawful act. Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State ... The determination whether a particular entity is a State organ must be the result of a factual inquiry."[26]

It also notes that:

> "the proviso that the organ of the State 'was acting *in that capacity* in the case in question' is not defined. The reference to 'capacity' could be read as enabling a wrongdoing State to dispute its liability on the grounds that, while the State organ committed the wrongful act, it acted outside its scope of competence. Such a reading would undermine the principle that responsibility for the action of State organs is governed by international law."[27]

The meaning of the term "acting in that capacity" will be discussed in the context of article 10.[28]

The term "organ"

166. In the case of a "corporate" entity such as the State it is useful to distinguish between organs of the State (persons or entities which are part of the structure of the State and whose conduct as such is attributable to the State) and agents. As explained in the commentary, "agents" for this purpose are persons or entities in fact acting on behalf of the State by reason of some mandate or direction given by a State organ, or (possibly) who are to be regarded as acting on behalf of the State by reason of the control exercised over them by such an organ. The latter category is dealt with in article 8.[29] There are substantive differences between the two cases. For example, the unauthorized acts of organs are to be attributed to the State for the purposes of responsibility,[30] whereas different considerations may apply to the unauthorized acts of agents: this distinction is made by article 10. Thus while agreeing with the French Government's observation that the draft articles should cover both the situation of "organs" and that of "agents", the Special Rapporteur believes that the distinction made between the two categories in articles 5 and 8 should be maintained.

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[25] Ibid., p. 37.

[26] Ibid., p. 36.

[27] Ibid., p. 36.

[28] See below, paras. 238-243.

[29] See below, paras. 198-216.

[30] See below, paras. 238-243, for the question of *ultra vires* acts of persons under cover of their official functions.

The reference to "internal law"

167. As noted by several Governments, there is a problem with the *renvoi* in article 5 to the internal law of the State in determining whether a person or entity is to be classified as an organ. Article 5 refers to "any State organ having that status under the internal law of that State". No doubt internal law will be highly relevant to the question whether a person or body is an "organ", but there are several difficulties in treating internal law alone as decisive for that purpose. In the first place, the status of governmental entities in many systems is determined not only by law but by practice and convention; reference only to law can be seriously misleading.[31] Secondly, internal law may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Thirdly, even if it does so, this will be for its own purposes, and there is no security that the term "organ" used in internal law will have the very broad meaning that it has under article 5. For example, under some legal systems the term "government" has a specialized meaning, referring only to bodies at the highest level such as the Head of State and the Cabinet of Ministers. In other legal systems, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[32] The commentary to article 5 accepts this point, noting that the reference to internal law is "without prejudice to the different meanings which the term 'organ' may have, particularly in the internal public law of different legal systems".[33] But in most legal systems, the only classification of organs will be for the purposes of "internal public law".

The requirement that the organ act "in that capacity in the case in question"

168. Article 5 concludes with the phrase "provided that organ was acting in that capacity in the case in question". The term "acting in that capacity" will be discussed in the context of article 10.[34] Subject to that point, there is no difficulty with the notion that a person or entity may have various capacities, not all involving conduct as an "organ" of the State. To take an obvious case, the Head of State may act in a private capacity;[35] so may a diplomatic agent.[36] But the language of the proviso might tend to suggest that there is a special onus on a claimant to show, over and above the fact that the conduct was that of an organ, that it was acting in an official capacity. A more neutral phrase is to be preferred.

169. Before reaching conclusions on article 5, it is necessary to consider article 6, to which it is closely linked.

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[31] Cf. I. Brownlie, *State Responsibility. Part I* (1983), p. 136 (citing the case of the Metropolitan Commissioner for Police in the United Kingdom).

[32] See, e.g., *Case No. VI ZR 267/76 (Church of Scientology case) NJW* 1979, p. 1101; 65 ILR 193 (FRG, Federal Constitutional Court); *Propend Finance Pty. Ltd. v Sing* (1997) 111 ILR 611 (England, Court of Appeal). These were State immunity cases, but the same principle must also apply in the field of State responsibility.

[33] Commentary to Article 5, para. 13.

[34] See below, paras. 235-243.

[35] As is recognized in the Commission's Draft Articles on the Immunities of Foreign States and their Property, art. 2 (1) (b) (v) & commentary: *Yearbook* ... 1991, vol. II (Part Two), pp. 18-19.

[36] Cf. Vienna Convention on Diplomatic Relations 1961, art. 39, para. 2.

(b) Article 6: Irrelevance of the position of the organ in the organization of the State

170. Article 6 provides:

> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

171. This is not so much a rule of attribution as an explanation of the scope of article 5. As the commentary points out, in the nineteenth century there had been uncertainty on each of the issues addressed in article 6, but these uncertainties had been conclusively resolved through State practice and judicial opinions. Article 6 is in a sense a memento of these dead controversies, but as will be seen, a number of new issues have taken their place.[37]

Comments of Governments on article 6

172. The only comment so far is that of France, which fully accepts the principle underlying article 6 but notes that ...

> "the distinction it establishes between functions of an international character and those of an internal character is not without ambiguity. It would, furthermore, be preferable to replace the expression "constituent, legislative, executive, judicial or other power" ("*pouvoir constituant, législatif, judiciaire ou autre*") by "exercises constituent, legislative, executive, judicial or other functions" ("*exerce des fonctions constituantes, législatives, exécutives, judiciaires ou autres*")."[38]

Substantive issues raised by article 6

173. Article 6 has three elements, which need to be considered in turn.

(i) "Whether that organ belongs to the constituent, legislative, executive, judicial or other power"

174. As suggested by the Government of France, it seems better to refer not to legislative, judicial, etc. branches of government but to those functions, which are very differently distributed under different national systems. However the comment raises a question of substance. Are these words intended as words of limitation, namely, so as to limit State responsibility to cases of the exercise of public power? At least one commentator has argued that the existing text and commentary at least leave the matter doubtful.[39] Clearly doubts on so fundamental a question should be resolved.

175. As to the interpretation of the existing text, the position seems to the Special Rapporteur to be clear. Provided that a State organ is acting in its capacity as such (and not in some extraneous, purely private capacity), all its conduct is attributable to the State. This is what article 5 says prima facie, and the reference to the different "powers" of government in article 6 is nowhere expressed to limit the scope of article 5.

176. As to the question of whether article 5 should be so limited, again the position seems clear. It is true that distinctions between different classifications of State conduct, by

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[37] Cf. commentary to article 6, para. 16.

[38] A/CN.4/488, p. 38.

[39] L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances" (1984) 189 *Receuil des cours* 9 at pp. 66-76.

reference to terms such as *acta iure gestionis* and *acta iure imperii*, have developed in the last 20 years in the context of the immunity of States from the jurisdiction of national courts.[40] But that is an entirely different question from State responsibility, and there is no basis for the idea that a State could evade responsibility for one of its own acts by arguing, not that the act was committed by a private party, but that it *could* have been so committed, that is, that it was an act *iure gestionis*. Thus, for example, a State could not refuse to employ persons of a particular race or religion, or refuse to employ women, in defiance of its international obligations in relation to non-discrimination. Nor could it refuse to procure goods from nationals of a particular State, or refuse to pay debts owing to such nationals, in violation of a bilateral trade or investment treaty or multilateral trade commitment. The fact that in each of these cases the conduct in question could be classified as *acta iure gestionis* is irrelevant.

177. This is the position taken in most modern doctrine,[41] and by those courts which have considered the question. For example the Mayor of Palermo requisitioned and attempted to run an industrial plant in order to maintain local employment; it was accepted without question that his conduct was attributable to the State of Italy, irrespective of the classification of that conduct.[42] The jurisprudence of the human rights bodies is equally clear, and is reflected in the following passage from the *Swedish Engine-drivers' Union Case*:

> "The Convention nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. In this respect, Article II is no exception. What is more, paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of 'lawful restrictions' in the case of members of its armed forces, police or administration. Article II is accordingly binding upon the 'State as employer', whether the latter's relations with its employees are governed by public or private law. Consequently, the Court does not feel constrained to take into account the circumstance that in any event certain of the applicant's complaints appear to be directed against both the Office and the Swedish State as the holder of public power. Neither does the Court consider that it has to rule on the applicability, whether direct or indirect, of Article II to relations between individuals *stricto sensu*."[43]

178. Several clarifications are however in point. First, the character of an act may be relevant, among other factors, in deciding whether a State organ or official has acted in its capacity as such, or as a private individual or entity.[44] Secondly, the distinction between attribution and breach needs always to be borne in mind. The reason a State is not, generally speaking, internationally responsible for the "private law" acts of its organs (e.g. the breach of a commercial contract entered into by the State) has nothing to do with attribution; it is simply that the breach of a contract is not a breach of international law but of the relevant national law. Thirdly, this discussion only relates to the conduct of organs of the State in the sense of article 5. The position of separate entities or of State-owned corporations is different and is discussed below.

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[40] It has frequently been pointed out that different legal systems interpret and apply these distinctions differently, and that the extent of the international consensus is limited. See, e.g., M. Cosnard, *La soumission des Etats aux tribunaux internes face à la théorie des immunités des Etats* (1996).

[41] See especially Condorelli, loc. cit. In addition, see Dipla, pp. 40-45 and authorities cited.

[42] *ELSI Case (United States v Italy)* ICJ Reports 1989, p. 15.

[43] ECHR Ser. A, vol. 20 at p. 14. To similar effect, *Schmidt and Dahlström* ECHR Ser. A, vol. 21 at p. 15.

[44] See above, para. 168.

(ii) "Whether its functions are of an international or an internal character"

179. This qualification is unnecessary. There cannot be the slightest doubt that State responsibility is attracted by acts whether "of an international or an internal character". In addition the formula tends to suggest a too categorical distinction between the "international" and "internal" domains. It will be sufficient to make the point in the commentary.

(iii) "Whether it holds a superior or a subordinate position in the organization of the State"

180. It is fundamental to the idea of State responsibility that the conduct of any organ within the governmental system, from the Head of State down, is attributable to the State, provided that the conduct is carried out by that organ in its capacity as such. As the commentary notes,

> "After the Second World War the Italian/United States of America, Franco-Italian and Anglo-Italian Conciliation Commissions established under article 83 of the Treaty of Peace of 10 February 1947 often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officials, and always agreed to treat the acts of such persons as acts attributable to the State."[45]

The situation is thus beyond doubt, and is confirmed by more recent decisions. For example, in the *ELSI Case (United States of America v Italy)* it was uncontested that the acts of a local government official, the Mayor of Palermo, were attributable to the Italian State.[46]

181. As to the formula, "whether it holds a superior or subordinate position", this might appear to omit "intermediate" bodies and bodies which because of their independence it may be inappropriate to describe as subordinate (e.g. the criminal courts). The phrase "whatever position it holds in the organization of the State" is to be preferred.

Placement of article 6

182. Clearly the substance of article 6 should be retained. Since it is a clarification of the term "organ" in article 5, rather than a distinct rule of attribution, it could be included in the formulation of article 5 itself. This would have the advantage of allowing the three major rules of attribution in articles 5, 7 and 8 to be presented without interruption.

Conclusions on articles 5 and 6

183. For these reasons, articles 5 and 6 should be combined in a single article, with the various minor amendments indicated. In addition, and for greater consistency with article 4, the reference to internal law should be deleted. The commentary should explain the relevance of internal law in determining whether a person or body is an "organ" for the purposes of the draft articles, and the irrelevance of the classification of its functions once it is determined that the organ is acting as such.[47]

(c) Article 7: Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

184. As its title suggests, article 7 deals with "other entities", namely, bodies which are not organs in the sense of article 5, but which nonetheless exercise governmental authority. It provides:

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[45] Commentary to article 6, para. 14 and the decisions cited in note 31.

[46] *ICJ Reports* 1989, p. 15, p. 52 (para. 75).

[47] For the text of the proposed provision see below, para. 287.

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question;

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

185. The commentary to article 7 notes that the principle of attribution should apply to all entities which exercise governmental functions, both "when the basis of their separate existence is the local or territorial setting which they act (as in the case of municipalities, provinces, regions, cantons, component States of a federal State and so on) and when this basis is, instead, the special nature of the functions performed (as may be the case of a bank of issue, a transport company entitled to exercise police powers, and so forth)".[48] Article 7 is designed to deal with both categories.

186. As to paragraph 1, the commentary focuses on the component units of federal States. It asserts "the principle of the international responsibility of the federal State for the conduct of organs of component States amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide the federal State with means of compelling the organs of component States to abide by the federal State's international obligations".[49] Only when the obligation in question is incumbent on the component unit, as distinct from the federal State, does the question of separate attribution to that unit arise.[50]

187. As to paragraph 2, the commentary notes its origin in the work of the 1930 Hague Codification Conference, where reference was made to such "autonomous institutions as exercise public functions of a legislative or administrative character".[51] It also notes the proliferation of these bodies and the difficulty of defining them other than by reference to the delegation of public power by law:

> The fact that an entity can be classified as public or private ..., the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent ... do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs ... [T]he most appropriate solution is to refer to the real common feature which these entities have: namely, that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State ... Thus, for example, the conduct of an organ of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it falls within the exercise of those powers.[52]

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[48] Commentary to article 7, para. 2.

[49] Ibid., para. 5, and see the authorities cited in paras. 5-9.

[50] Ibid., para. 10.

[51] Ibid., para. 15, citing Basis of Discussion No. 23 of the Preparatory Committee for the 1930 Hague Conference (*Yearbook ... 1965*, vol. II, p. 223, document A/CN.4/96, annex 2), p. 92.

[52] Commentary to article 7, para. 18.

The term "entity" was chosen on the basis that it was "wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies".[53]

Comments of Governments on article 7

188. France queries the notion of "territorial governmental entity", and suggests that the case of federal States be specifically mentioned.[54]

189. The United Kingdom asks for clearer guidance to be provided on the increasingly common phenomenon of para-statal entities (e.g. private security firms acting as railway police or as prison guards). Another example is former State corporations which have been privatized but which may retain certain public or regulatory functions.[55] It calls for clarification of the notion of "governmental authority". Along similar lines, Germany suggests that the chapter II "might not sufficiently take into account the fact that States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State".[56]

"Territorial governmental entities"

190. The first issue presented by article 7 is its separate identification of "territorial governmental entities", which includes a wide range of territorial administrative units. The essential difficulty here was analysed by Czechoslovakia in its comment of 24 July 1981:

> "The internal organization of a State is not subject to international law, but is governed by its national law ... This principle has been duly reflected in articles 5 and 6. As far as the acts of organs of entities of territorial division of States are concerned, these organs should be taken as forming part of the structure of a State. Consequently, acts of organs of this kind should be already covered by the provisions of articles 5 and 6. In this light, the provision of article 7, paragraph 1, seems to be superfluous, at least as far as the entities of territorial division of a State without any international personality is concerned."[57]

The present Special Rapporteur agrees with this analysis. As the commentaries to articles 5 and 6 makes clear, those articles were intended to cover organs of government, superior, autonomous or subordinate, whether located in the capital or elsewhere, and whatever the extent of their jurisdiction within the State. On that basis, it is clear that local and regional governmental units are already covered by those articles, whatever their designation or status might be under the constitutional law of the State concerned. To treat them as "entities separate from the State machinery proper"[58] is an error. The State as a whole is not to be equated with its central government. Moreover local or regional governmental units are like the organs of central government, and quite unlike the "entities" covered by article 7, paragraph 2, in that all their conduct as such is attributable to the State, and not only conduct involving the exercise of "governmental authority" in some narrower sense.[59] The commentary to article 7 expressly accepts the established principle that a State federal in structure is a State like any other, and that it cannot rely on the federal or decentralized

[53] Ibid., para. 19.
[54] A/CN.4/488, p. 39.
[55] Ibid., p. 40.
[56] Ibid., p. 36.
[57] *Yearbook* ... 1981, vol. II (Part One), p. 73.
[58] Commentary to article 7, para. 17.
[59] See above, paras. 168, 174-178.

character of its constitution to limit the scope of its international responsibilities.[60] The separate identification of "territorial governmental entities" cuts across that principle.

191. This conclusion is not affected by the fact that federal or other territorial units within a State have separate legal personality under the law of that State. This is true of many of the organs referred to in article 5: it is for example common for the central departments of government to have separate legal personality, but this does not affect the principle of the "unity of the State" for the purposes of international law, as Arbitrator Dupuy pointed out in his Preliminary Award in the *Texaco Arbitration*.[61] No doubt the position may be different in those exceptional cases where component units in a federal State exercise some limited international competences, for example, for the purposes of concluding treaties on local issues. To the extent that these treaties do not commit the federation as such but only the local units, no question of State responsibility in the sense of the draft articles can arise. To the extent that they do commit the federation, the ordinary rules of attribution stated in article 5 should apply. It is accordingly recommended that article 7, paragraph 1, and the reference to territorial governmental entities in article 7, paragraph 2, be deleted.[62] The commentary to article 5 should make it clear that the organs of the State include the organs of local and regional governmental units of the State, whatever their designation may be.

"Para-statals" exercising government functions

192. The position is different so far as paragraph 2 is concerned. The number of "para-statal" entities performing governmental functions is increasing and the question needs to be addressed in the draft articles. For the reasons stated in the commentary and affirmed in various government comments, this aspect of article 7 should be maintained. It is clear from the commentary that article 7 intends to catch such persons as private security guards acting as prison warders, to the extent that they exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.[63] This addresses concerns of the United Kingdom referred to above,[64] although no doubt the commentary could provide more and more recent examples.[65]

193. It is another thing to identify precisely the scope of "governmental authority" for this purpose, and it is very doubtful whether article 7 itself should attempt to do so. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be, not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised, and the extent to which the entity is accountable to government for their exercise. The commentary can give guidance on these questions, but they are essentially questions of the application of a general standard to particular and very varied circumstances. It will be a matter for the claimant to demonstrate that the injury does relate to the exercise of such

[60] Ibid., para. 5; above, para. 186.

[61] (1975) 53 International Law Reports 389 at p. 415, para. 23. See above, para. 158.

[62] This is consistent with the position taken in the Vienna Convention on the Law of Treaties 1969, and with the literature on federal States in international law: see, e.g., L. Wildhaber, *Treaty-Making Power and Constitution* (1971), Part II; I. Bernier, *International Legal Aspects of Federalism* (1973); H. Michelmann and P. Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (1990); B. Opeskin and D. R. Rothwell, *International Law and Australian Federalism* (1997).

[63] Cf. also *Barthold v Federal Republic of Germany* ECHR Ser. A, vol. 90 (1985) at p. 21 (rules of professional association given force of law).

[64] See para. 189 above.

[65] A more recent example of an entity within the category of "separate entities" under article 7, para. 2 is the Foundation for the Oppressed: see *Hyatt International Corporation v Iran* (1985) 9 Iran-United States Claims Tribunal 72.

powers: the language of the proviso to that effect in paragraph 2 should be retained, in contrast to the formulation already proposed for article 5.[66]

Conclusion as to article 7

194. For these reasons, it is recommended that the references to "territorial governmental entities" in article 7 and elsewhere be deleted, but that the substance of article 7, paragraph 2 be retained.[67]

(d) Article 8: Attribution to the State of the conduct of persons acting in fact on behalf of the State

195. In contrast to articles 5 and 7, which deal with State organs or other entities exercising governmental authority, article 8 deals with other cases where persons or groups have in fact acted "on behalf of" the State. It provides:

> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (a) it is established that such person or group of persons was in fact acting on behalf of that State; or
>
> (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Comments of Governments on article 8

196. Although few Governments commented on article 8 as such, a number of general comments were directed to the problem of State responsibility for acts of individuals or entities not formally part of the State structure. Germany, Mongolia and the United Kingdom all suggested that the draft articles should be more expansive in dealing with this category.[68] The United States, for its part, agreed with "the basic thrust of [article 8] that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship".[69]

197. Like article 7, article 8 deals with two different cases. Article 8 (a) is concerned with persons or groups of persons acting in fact on behalf of the State. Article 8 (b) deals with the much rarer case of conduct in the exercise of this governmental authority by a person or persons not actually authorized to act by the State but "justifiably" acting in its absence. It is necessary to deal with the two separately.

(i) Persons acting in fact on behalf of the State

198. As the commentary points out, the attribution to the State or conduct in fact directed or authorized by it is "practically undisputed".[70] In such cases, it does not matter that the person or persons involved are private individuals; nor does it matter whether or not their

[66] See para. 168 above.

[67] A few minor amendments to the language of paragraph 2 are proposed: see para. 287 for the proposed text and notes.

[68] See paras. 153, 155 and 156 above.

[69] A/CN.4/488, p. 41.

[70] Commentary to article 8, para. 7, citing, *inter alia*, the *Zafiro* and *Stephens* cases: United Nations, *Reports of International Arbitral Awards*, vol. VI, p. 160; ibid., vol. IV, p. 267.

conduct involves "governmental" activity. The commentary also makes it clear that the term "person" includes an entity, whether or not it has separate legal personality.[71]

199. In its formulation of article 8 (a), the words "it is established that" were added. According to the commentary this was done because ...

> "In each specific case in which international responsibility of the State has to be established, it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs."[72]

But it is always the case that a claimant has to show that the conditions for State responsibility are satisfied.[73] Why should this burden be heavier in cases where actual authority or direction is relied on, as compared with other cases? It is suggested that the phrase be deleted.

The relevance of State control

200. In the passage just cited, the phrases "actually appointed" and "performed at the instigation of" together imply that article 8 (a) is limited to cases of actual direction or instruction, that is, to cases of actual agency. Elsewhere the commentary is more equivocal. For example, in the commentary to article 11 it is said that:

> "Where that Government is known to encourage and even promote the organization of [armed opposition] groups, to provide them with financial assistance, training and weapons, and to coordinate their activities with those of its own forces for the purpose of possible operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become formations which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. They then fall into the category of persons or groups which are linked, in fact if not formally, with the State machinery and are frequently called 'de facto organs', and which were dealt with in article 8 (a) of this draft."[74]

The language of "promotion" and "coordination" is less emphatic than that of "appointment" or "instigation", and it raises the question whether the de facto control of a State over a person or group should be treated as a distinct basis for attribution. If not, then the language of article 8 (a) may need reconsideration. As a matter of ordinary language, a person may be said to act "on behalf of" another person without any actual instruction or mandate from that other person. The question is not simply one of drafting, it is one of substance. To what extent should de facto agency be limited to cases of express agency?

The *Nicaragua* case

201. This was a key issue in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.[75] Was the conduct of the *contras* as such attributable to the United States, so as to hold the latter generally responsible for that conduct? The Court analysed that issue almost exclusively in terms of the notion of "control". On the one hand, it held that individual attacks by Nicaraguan operatives

[71] Commentary to article 8, para. 1.

[72] Ibid., para. 8.

[73] See para. 159 above.

[74] Commentary to article 11, para. 32.

[75] *ICJ Reports* 1986, p. 14.

(so-called "UCLAs") were attributable to the United States by reason of the "planning, direction and support" of United States agents.[76] But it went on to consider, and reject, the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

> "Despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf ... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*"[77]

Thus, while the United States was held responsible for its own support for the *contras*, only in a few individual instances were the acts of the *contras* themselves held attributable to it.

202. It is relevant to note the comments of Judge Ago on these issues. Referring to article 11 of the draft articles, he stated in his concurring opinion that ...

> "It would ... be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name or on behalf of the United States of America. Only in cases where certain members of [the *contras*] happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such cases does international law recognize, as a rare exception to the rule, that the conduct of persons which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of the State."[78]

Judge Ago went on to criticize the Court for its use of the term "control". In his view, "the situations which can be correctly termed cases of indirect responsibility are those in which one State that, in certain circumstances, exerts control over the actions of another can be held responsible for an internationally wrongful act *committed by and imputable to that second State*".[79] According to this view, the criterion of control is relevant in inter-State relations (indeed, the term "direction or control" is used in article 28). But it is not a criterion for attributing the conduct of non-State entities to the State.

203. Although there was no disagreement between Judge Ago and the majority of the Court as to the result, there was a difference in approach. The Court was prepared to hold the United States responsible for conduct of the *contras* in the course of specific operations over which the United States was shown to have "effective control", whereas Judge Ago required nothing less than specific authorization of the wrongful conduct itself. On the other hand,

[76] Ibid., p. 51.

[77] Ibid., pp. 62, 64-65 (emphasis added).

[78] Ibid., pp. 188-189.

[79] Ibid., p. 189, note 1 (emphasis in original).

they agreed that a *general* situation of dependence and support were insufficient to justify attribution.

The *Tadic* case

204. The International Criminal Tribunal for the Former Yugoslavia had to face a seemingly analogous problem in the case of *Prosecutor v Tadic*.[80] The question there was whether the applicable law on a war crimes charge was the law of international or internal armed conflict. That in turn depended on whether the victims of the alleged crimes were at the relevant time "in the hands of a party to the conflict of which they are not nationals" within the meaning of article 4 of Geneva Convention IV of 1949. If they were not, the accused's conduct was to be judged only by reference to common article 3 of the 1949 Conventions.

205. According to the majority of the Trial Chamber, the Court in *Nicaragua* "set a particularly high threshold test for determining the requisite degree of control".[81] After noting the differences between the two cases, it formulated the question in the following terms: "whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS ... can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)".[82] It concluded that

> "There is, in short, no evidence on which this Trial Chamber may confidently conclude that the armed forces of the Republika Srpska, and the Republika Srpska as a whole, were anything more than mere allies, albeit highly dependent allies, of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in its plan to achieve a Greater Serbia from out of the remains of the former Yugoslavia. The continued, indirect involvement of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the armed conflict in the Republic of Bosnia and Herzegovina, without the ability to impute the acts of the armed forces of the Republika Srpska to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), gives rise to issues of State responsibility beyond the scope and concern of this case."[83]

This finding had direct consequences for the innocence of the accused in relation to charges which were dependent on the finding of an international armed conflict.

206. Judge McDonald dissented on this point, essentially for three reasons. As a matter of law, the majority had read the *Nicaragua* test too strictly; as a matter of fact, she disagreed over the inferences to be drawn from the evidence (including the fact that all the members of the armed forces of Republika Srpska continued to be paid and armed by the Federal Republic of Yugoslavia (Serbia and Montenegro)). But in particular, in her view ...

> "By importing the standard of effective control which was designed to determine State imputability in *Nicaragua* to determine both whether a victim is a protected person and for the purpose of characterizing the nature of an armed conflict, the majority has expanded the reach of the holding of *Nicaragua* in a way that is incompatible with international humanitarian law."[84]

207. The decision is under appeal and it would be inappropriate to express any view about it. What can be said, however, is that both the majority and minority interpreted *Nicaragua*

[80] (1997) 112 International Law Reports 1.
[81] Ibid., p. 190, para. 585 (Judges Stephen and Vohrah).
[82] Ibid., p. 191, para. 588.
[83] Ibid., p. 200, para. 606.
[84] Ibid., p. 270 (Judge McDonald, dissenting).

as allowing attribution to be based on the exercise of command and control in relation to a particular operation, and that neither went as far as Judge Ago in requiring a "specific charge" or instruction.

The jurisprudence of the Iran-United States Claims Tribunal

208. The Iran-United States Claims Tribunal has also had to deal with this problem, although care is needed in analysing the cases since its jurisdiction is explicitly extended to claims in contract against any "entity controlled by" either contracting party. In such cases, the Tribunal has acted as a surrogate for the relevant national court and issues of State responsibility have not been relevant. In particular, the fact that the Islamic Republic of Iran guaranteed the payment of awards from the escrow fund did not necessarily mean it was liable on the awards themselves.[85]

209. The question of the responsibility of a State for its controlled corporations raises special issues and is discussed below. Turning to the question of "agency" dealt with in article 8 (a), the Tribunal has applied a broadly de facto analysis to such bodies as the Komitehs or Revolutionary Guards in the period prior to their incorporation as organs of the State. For example in *Yeager v Islamic Republic of Iran*, the Tribunal said:

> "While there is some doubt as to whether revolutionary 'Komitehs' or 'Guards' can be considered 'organs' of the Government of Iran since they were not formally recognized during the period relevant to this Case, attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. See ILC-draft article 8 (a) ..."[86]

The *Loizidou* Case

210. The relationship of a State's control over a situation to its responsibility for the situation was also an issue before the European Court of Human Rights in *Loizidou v Turkey*. The question was whether Turkey could be held responsible for the denial of access to the applicant's property in northern Cyprus arising from the division of Cyprus and the consequent barriers to freedom of movement. The Court said:

> "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' ... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of article 1 of the Convention. Her

[85] The distinction was explained by the Tribunal in *Starrett Housing Corp. v Government of the Islamic Republic of Iran* (1983) 4 Iran-United States Claims Tribunal 122 at p. 143; see also Caron, pp. 112-119.

[86] (1987) 17 Iran-United States Claims Tribunal 92 at p. 103, and see the whole passage at pp. 103-105. It should be noted that in that case there was evidence of encouragement from organs of the State but no evidence of any instructions or directives.

obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."[87]

The Court thus based Turkey's responsibility for the denial to the applicant of freedom of access to its property, contrary to article 1 of Protocol 1, on a global appreciation of Turkey's "control" over the island, an appreciation based both on the number of Turkish troops there and on the illegitimacy of the "TNRC". In effect, the Court held that

> "In conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[88]

211. This "global" approach was criticized in the dissenting opinion of Judge Bernhardt, who said that:

> "The presence of Turkish troops in northern Cyprus is one element in an extremely complex development and situation. As has been explained and decided in the *Loizidou* judgment on the preliminary objections ... Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials. But in the present case, we are confronted with a special situation: it is the existence of the factual borderline, protected by forces under United Nations command, which makes it impossible for Greek Cypriots to visit and to stay in their homes and on their property in the northern part of the island. The presence of Turkish troops and Turkey's support of the 'TRNC' are important factors in the existing situation; but I feel unable to base a judgement of the European Court of Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus."[89]

The case lies in the shadowland between issues of attribution and causation; the latter will be dealt with in reviewing part two of the draft articles, especially article 44. But it should be observed, first, that the majority of the Court regarded itself as applying principles of "imputability"[90] and, second, that they did not base themselves exclusively on the unlawful character of Turkish control over Northern Cyprus.[91]

Conduct by State-owned corporations

212. Related questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned, is their conduct attributable to it? In discussing this issue it is necessary to recall, in accordance with the statement of the International Court in the *Barcelona Traction* case, that international law acknowledges the general separateness of

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[87] ECHR Ser. A Vol. 707 (1996), para. 56.

[88] Ibid., para. 52, referring back to its decision on the preliminary objections: ECHR Ser. A Vol. 310 (1995) at para. 62.

[89] ECHR Ser. A Vol. 707 (1996), dissenting opinion of Judge Bernhardt, para. 3.

[90] Ibid., para. 52.

[91] The lack of separate international status of the "TRNC" was however relevant, since it deprived Turkey of the justification of basing its occupation on the consent of the latter. In effect the "TRNC" was treated as a subordinate organ of Turkey, and in this sense considerations of legality affected the decision on attribution.

corporate entities at national level, except in special cases where the "corporate veil" is a mere device or a vehicle for fraud.[92]

213. Clearly, the fact that the State initially establishes a corporate entity (whether by a special law or pursuant to general legislation) is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[93] Since corporate entities, although owned by (and in that sense subject to the control of) the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State, unless they are exercising aspects of governmental authority as referred to in article 7, paragraph 2. This was the position taken, for example, in relation to the seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[94] On the other hand, where there was evidence that the corporation was exercising public powers,[95] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[96] the conduct in question has been attributed to the State.

214. The distinction outlined in the previous paragraph seems to be a defensible one.[97] The consequence of attribution is to aggregate all the conduct concerned and to connect it to the State as an entity of international law, for the purposes of State responsibility. But this does not mean that differences, including differences in internal legal status, between the entities involved are irrelevant in deciding whether conduct should be attributable. It is here that the approach to corporate personality set out by the Court in *Barcelona Traction* must be taken into account. That approach, though not itself part of the law of attribution is a factor to be applied in the process of attribution. Consequently, the extension of article 8 (a) to cover cases of conduct carried out under the direction and control of a State would not have the effect of making all the conduct of all State corporations attributable to the State for the purposes of international law.

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[92] *ICJ Reports* 1970, p. 3.

[93] E.g. the workers' councils considered in *Schering Corporation v Islamic Republic of Iran* (1984) 5 Iran-United States Claims Tribunal 361; *Otis Elevator v Islamic Republic of Iran* (1987) 14 Iran-United States Claims Tribunal 283; *Eastman Kodak Co. v Islamic Republic of Iran* (1987) 17 Iran-United States Claims Tribunal 153; discussed by Aldrich, pp. 204-6; Caron, pp. 134-5.

[94] *SEDCO Inc v National Iranian Oil Co.* (1987) 15 Iran-United States Claims Tribunal 23. See also *International Technical Products Corp. v Islamic Republic of Iran* (1985) 9 Iran-United States Claims Tribunal 206 (acts of Bank Tejarat, a nationalized bank, not attributable to Iran); *Flexi-Van Leasing v Islamic Republic of Iran* (1986) 12 Iran-United States Claims Tribunal 335 at p. 349 (contractual liabilities of nationalized companies not attributable to the Islamic Republic of Iran in the absence of proof of "orders, directives, recommendations or instructions from the ... Government") See the discussion by Caron, pp. 163-175.

[95] *Phillips Petroleum Co. Iran v Islamic Republic of Iran* (1989) 21 Iran-United States Claims Tribunal 79; *Petrolane Inc v Government of the Islamic Republic of Iran* (1991) 27 Iran-United States Claims Tribunal 64.

[96] *Foremost Tehran Inc. v Islamic Republic of Iran* (1986) 10 Iran-United States Claims Tribunal 228; *American Bell International v Islamic Republic of Iran* (1986) 12 Iran-United States Claims Tribunal 170.

[97] See also *Herzberg v Finland. Communication No. R.14/61* (1982), in A/37/40, annex XIV, para. 9.1 (discretionary decision of Finnish Broadcasting Co. executive not to broadcast a particular program; conduct attributable to Finland on the grounds of its "dominant share" (90%) in FBC, but also on the basis that the FBC was "under specific government control: para. 9.1). See also *Application 4125/69.X v Ireland* (1971) 14 ECHR YB 198 (Irish Electricity Supply Board); *Young, James and Webster v United Kingdom* ECHR Ser. A Vol. 44 (1981) (British Rail).

The question for the Commission

215. The question is whether article 8 (a) should extend beyond cases of actual authorization or instruction to cover cases where specific operations or activities are, in fact, under the direction and control of the State. The present text ("in fact acting on behalf of that State") is less than clear on the point, but Judge Ago seems to have thought that it was limited to cases of express instructions.[98] The difficulty is that, in many operations, in particular those which would obviously be unlawful if attributable to the State, the existence of an express instruction will be very difficult to demonstrate.

216. It can be argued that the issue presented in *Nicaragua* related specifically to the extent of the obligation of a State to control irregular forces or auxiliaries acting under its auspices, and that this is either a question of the content of the relevant primary rule, or alternatively a customary *lex specialis* in that specific context. However that may be, the issue of the direction and control of a State as a basis for attribution does arise in a general way, and in *Nicaragua* the Court appears to have been treating this issue as one of general principle. Moreover it is not clear why conduct of auxiliary armed forces in operations under the specific direction and control of a State should be attributable to the State, but not analogous conduct under State direction and control in other spheres. The position taken by the majority of the Court in *Nicaragua* was not the subject of any specific dissent in that case, nor has it been criticized as overbroad in later decisions or in the literature.[99] For all of these reasons, the Special Rapporteur is provisionally of the view that article 8 (a) should be clarified, that it is desirable to attribute to the State specific conduct carried out under its direction and control, and that appropriate language to that effect should be added. The text and commentary should make it clear that it is only if the State directed and controlled the *specific* operation and the conduct complained of was a necessary, integral or intended part of *that* operation, that the conduct should be attributable to the State. The principle should not extend to conduct which was only incidentally or peripherally associated with an operation, or which escaped from the State's direction and control.[100]

(ii) Agents of necessity: the exercise of State powers in the absence of the State

217. Article 8 (b) makes attributable to the State the conduct of a person or group of persons "in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority". The commentary notes that the cases envisaged by paragraph (b) only occur in exceptional cases, such as revolution, armed conflict or foreign occupation where the regular authorities dissolve, are suppressed or are for the time being inoperative. It stipulates that attribution to the State is

> "admissible only in genuinely exceptional cases ... [F]or this purpose, the following conditions must be met: in the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of

[98] See para. 202 above.

[99] See e.g., P-M Eisemann, "L'arrêt de la CIJ du 27 juin 1986 (fond) dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci" (1986) 32 *Annuaire Français de Droit International* 153 at pp. 179-80; J. Verhoeven, "Le droit, le juge et la violence. Les arrêts Nicaragua c, Etats Unis" (1987) 91 *RGDIP* 1159 at p. 1230-32; C Lang, *L'affaire Nicaragua/Etats Unis devant la Cour Internationale de Justice* (1990), pp. 216-222.

[100] See para. 287 below, for the proposed text of article 8 (a).

> official authorities ... and, furthermore, in circumstances which justified the exercise of these elements of authority by private persons."[101]

Comments of Governments

218. In its comment of 11 January 1980, Canada reserved its position with respect to article 8 (b), on the ground that a more restrictive formulation might be desirable.[102] There have been no more recent comments.

The underlying principle

219. The principle underlying article 8 (b) owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces which is recognized as legitimate by article 2 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War.[103] But there are occasional instances in the field of State responsibility proper. Thus the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as potentially covered by article 8 (b). *Yeager v Islamic Republic of Iran* concerned, *inter alia,* the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The Tribunal held their conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards

> "at least exercised elements of governmental authority in the absence of the official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object."[104]

The formulation of the principle

220. There is thus some authority in favour of the principle stated in article 8 (b), applicable in exceptional cases. Its formulation is however slightly paradoxical, in that it implies that conduct which may give rise to State responsibility is nonetheless "justified". It might be objected that if the conduct was wrongful it cannot have been "justified", so that the circumstances required for responsibility pursuant to paragraph (b) can never arise. This may have been why the Tribunal in *Yeager* did not use the actual formulation of the paragraph in the dictum just quoted. The commentary to article 8 (b) captures rather better the idea that the circumstances must have justified the *attempt* to exercise police or other functions in the absence of any constituted authority, rather than justifying the actual events as they occurred. This idea could usefully be reinforced in the commentary by reference to cases such as *Yeager*.

221. It is recommended that article 8 (b) be retained. For the reasons given the term "justified" should be replaced by the term "called for", thereby indicating that some exercise of governmental functions was called for, but not necessarily the conduct in question.

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[101] Commentary to article 8, para. 11. The commentary goes on to distinguish the de facto government of a State, the action of whose organs is covered by article 5, not article 8 (b). See ibid., para. 12, citing the *Tinoco Arbitration* (1923) 1 Report of International Arbitral Awards 24.

[102] *Yearbook* ... 1980 Vol. II (Part One), p. 94.

[103] Cited in the commentary to article 8, para. 9, note 593.

[104] (1987) 17 Iran-United States Claims Tribunal 92 at p. 104.

(e) Article 9: Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

222. Article 9 provides that:

> The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

223. The commentary to article 9 stresses that it deals with the limited and precise situation of organs of a State (or international organization) which are in effect "loaned" to another State.[105] The notion of an organ "placed at the disposal" of the receiving State is a very specialized one, implying that the "foreign" organ is acting with the consent, under the authority of and for the purposes of the receiving State. It does not deal with experts from another State or an international organization advising a Government, or individual officials seconded to another State.[106] It also excludes the case of State organs sent to another State for the purposes of the former State, or even for shared purposes, but which retain their own autonomy and status: for example, foreign military liaison or cultural missions,[107] foreign relief or aid organizations. One concrete example of a "loaned" agency is the United Kingdom Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth.[108] Its role is parallelled by certain final courts of appeal acting pursuant to treaty arrangements.[109] The commentary cites the *Chevreau* case as an instance of the form of "transferred responsibility" envisaged by article 9: in that case, a British Consul in Persia, in his capacity as temporary *chargé* of the French consulate, received but then lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power".[110] That was a case between the sending and the receiving States, and it is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for his acts. The more significant question will be: against which of the two States would a third State be entitled or required to claim? In accordance with article 9, the answer is the receiving State, provided the conduct was carried out on behalf of that State.[111]

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[105] The commentary notes (para. (6)) that cases of dependent territories such as "international protectorates" are also not covered by article 9 and this is clearly correct. For example in *United States Nationals in Morocco, ICJ Reports* 1952, p. 176, it was understood that the responsibility of France acting both on its own behalf and on behalf of Morocco was engaged. The United States had lodged a preliminary objection in order to get clarification of this point; it was withdrawn once the clarification was obtained. See *US Nationals in Morocco, Pleadings* Vol. 1, p. 235; *ICJ Reports* 1951 at p. 109.

[106] Commentary to article 9, para. 2.

[107] Ibid., para. 7.

[108] Ibid., para. 10. This is a good example of convention and practice determining the status in which an organ acts: see above, para. 167.

[109] E.g. the 1976 Agreement between Nauru and Australia, scheduled to the Nauru (High Court Appeals) Act 1976 (Cth).

[110] (1931) 2 United Nations Reports of International Arbitral Awards 1117 at p. 1141, cited in commentary to article 9, para. 13.

[111] Ibid., para. 17.

Comments of Governments on article 9

224. The United Kingdom asks, in the context of article 7 (2), for clarification on the position of acts of international organizations or their organs (such as the European Commission). It calls for

> "a clear indication in the Commentary that these draft articles are not intended to deal with the responsibility of member States for acts of international organizations (including military actions under the auspices of international or regional organizations). That is a complex issue; and it is not clear that it is desirable that the position of every international organization be the same. The topic of responsibility for acts of international organizations merits separate, detailed treatment."[112]

It also raises the question of compulsory reference to the courts of another state (e.g. under the Brussels Convention) or to an international body (e.g. an ICSID Tribunal). In such a case, is the referring state free of responsibility, no matter what happens after the case is referred? Again, in its view, the point should at least be addressed in the commentary.[113]

225. The Government of Uzbekistan also expresses the view that the responsibility of international organizations for their wrongful acts should be addressed, though in a separate instrument.[114]

When are State organs "placed at the disposal" of another State?

226. Article 9 deals with an extremely specialized issue: how specialized is clear from the definition given of the crucial phrase "placed at the disposal". According to the commentary, this

> "does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State."[115]

By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, this must be an unusual situation, although it is not unknown.

227. The European Commission of Human Rights had to consider this question in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[116] At the relevant time Liechtenstein was not a party to the European Convention, so that if the conduct in question was attributable only to Liechtenstein, no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.

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[112] A/CN.4/488, p. 40.

[113] Ibid., p. 42.

[114] Ibid., p. 30.

[115] Commentary to article 9, para. 5.

[116] *Application Nos. 7289/75, 7349/76, X and Y v Switzerland* (1983) 20 *Ybk ECHR* 402-406, discussed by Dipla, at pp. 52-53.

228. Analogous problems were faced by the European Commission and Court of Human Rights in a case concerning Andorra.[117] At a time when Andorra was not a party to the European Convention, two individuals were tried and sentenced to long terms of imprisonment by the Tribunal de Corts of Andorra. They elected to serve their sentence in France. They brought proceedings under the Convention against both France and Spain, alleging that they were responsible for deficiencies in the organization of the Andorran courts, and that France was responsible for their arbitrary detention, which no French law authorized.[118]

229. The Court drew a distinction between the original judicial process and the subsequent detention in France. The former was an Andorran process, which did not involve the exercise of governmental authority either of France or of Spain. French and Spanish judges served on the Andorran courts, but for that purpose they acquired Andorran nationality; they were formally seconded and in their Andorran capacity were neither responsible to nor controlled by the sending Governments.[119] As to their custody in France, on the other hand, France argued that "an adequate legal basis was provided by international custom and by the French and Andorran domestic law which implemented that custom". A narrow majority of the Court accepted that view and dismissed the complaint. To impose on France responsibility for ensuring that the original judgement complied with the Convention "would ... thwart the current trend towards strengthening international cooperation in the administration of justice"; thus the only obligation of France was not to participate in a "flagrant denial of justice", of which there was no sufficient evidence in that case. Thus the majority drew a distinction between the acts of French and Spanish officials (including the Co-Princes) in their capacity as Andorran organs, and the actions of France in giving effect to Andorran judgements: France's responsibility was attracted only by the latter.[120]

230. Another example of a "loaned" organ was the Auditor-General of New Zealand, who for a time acted as the auditor of the Cook Islands by agreement between the Cook Islands and New Zealand and pursuant to the Constitution of the Cook Islands.[121] The question arose whether the Auditor-General could be compelled to disclose Cook Islands documents acquired as a result of the exercise of this function, or whether the documents were entitled to sovereign immunity. The New Zealand Court of Appeal denied immunity, but nonetheless approached the case on the basis that the Auditor-General was performing an official function on behalf of the Cook Islands as a foreign State, and was not responsible to any New Zealand authority for the exercise of that function.[122]

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[117] The Co-Princes of Andorra are the President of France and the Bishop of Urgel in Spain. See J. Crawford, "The International Legal Status of the Valleys of Andorra" (1977) 55 *Revue de droit international, de sciences diplomatiques et politiques* 259; J. Duursma, *Fragmentation and the International Relations of Micro-States* (1966), pp. 316-373.

[118] *Drodz and Janousek v France and Spain*, ECHR Ser. A Vol. 359 (1992); Duursma, pp. 331-333.

[119] Ser. A Vol. 359 at para. 96. The Court noted that "the secondment of judges or their placing at the disposal of foreign countries is ... practised between member States of the Council of Europe, as is demonstrated by the practice of Austrian and Swiss jurists in Liechtenstein": ibid.

[120] Ibid., para. 110. On this point the Court was narrowly divided (12-11). The minority refused to accept that "there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects (enforcement of sentences being a further example) these States participate in its administration": ibid. (joint dissenting opinion, Judges Pettiti, Valticos, Lopes Rocha, Walsh and Spielmann).

[121] For a period, the audit function was further delegated by the Auditor-General to a private firm.

[122] *Comptroller and Auditor-General v Davidson* (1996) 104 International Law Reports 526 at pp. 536-537 (Cooke, P.), pp. 569, 574-576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed: [1996] 3 WLR 859, 108 International Law Reports 622.

Organs of international organizations as organs of States?

231. Thus examples can be found of State organs being "placed at the disposal" of another State in the sense of article 9. It is more difficult to find convincing examples of that practice in the case of international organizations. There is no doubt that an organ of an international organization may perform governmental functions for or in relation to States, pursuant to "delegated" powers or even on the authority of the organization itself.[123] But this does not necessarily mean that it is "loaned" to the States concerned, or that those States are responsible for its conduct. It seems clear, for example, that the various organs of the European Commission operating on the territory of the member States retain their Community character and are not covered by article 9. According to the Legal Office of the United Nations Secretariat, no United Nations operation, whether in the field of technical assistance, peacekeeping, election monitoring or in any other field, would involve "loaning" an organ to a State. In every case, the United Nations body would retain its separate identity and command structure. A possible example of an article 9 organ is the High Representative appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia-Herzegovina of 14 December 1995.[124] Despite the rather reserved way in which the mandate of the High Representative is defined in article II of annex 10, there is no doubt that the High Representative is exercising governmental authority in Bosnia and Herzegovina. Which entity is ultimately responsible for his activity is, however, unclear.[125]

232. As this example demonstrates, it may not be clear whether a person exercising governmental authority is doing so on behalf of an international organization or of a group of States, and in the latter case how the responsibility of the States concerned is to be related to their individual responsibility.[126] This latter problem will be discussed in more detail in the context of chapter IV of part one.

Provisional conclusion

233. In considering article 9 it is useful to distinguish between organs of States and of international organizations. Although it may only be rarely that the organ of one State is "placed at the disposal" of another for the purposes of exercising the public power of the latter, such cases do occur, as the examples of cooperative arrangements for final courts of appeal show. Thus, decisions of the Privy Council on appeal from an independent

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[123] For example, the International Criminal Tribunals for the former Yugoslavia and for Rwanda carry out investigatory and other functions in various States, not limited to the territories over which they exercise substantive jurisdiction. The European Commission can impose sanctions and penalties for certain breaches of European Union law, including on foreign corporations.

[124] (1996) 35 ILM 75.

[125] The High Representative was "designated" by a "Peace Implementation Council" and endorsed by the Security Council pursuant to annex 10 of the Agreement: see 35 ILM pp. 228-229. Under article V of annex X, the High Representative is "the final authority in theater regarding implementation of this Agreement on the civilian implementation of the peace settlement". See also Security Council resolution 1031 (1995) of 15 December 1995, paras. 26 and 27 Whether article 9 of the draft articles would apply to the High Representative depends, *inter alia*, on whether the Peace-Implementation Council qualifies as an "international organization". An earlier and less equivocal analogy was the High Commissioner for the Free City of Danzig, appointed by the League of Nations Council and responsible to it. See *Treatment of Polish Nationals in the Danzig Territory*, PCIJ Ser. A/B No. 44 (1932).

[126] A good example of the problem was presented by the question of State responsibility for Quadripartite action in Germany, which was considered at different times by the European Commission of Human Rights, the German Federal Constitutional Court and the English Court of Appeal. All reached the same conclusion, viz, that the individual respondent State was not answerable in those proceedings. See *Application 6231/73, Hess v United Kingdom* (1975) 2 DR 72 at p. 74; *Case No. 2 BvR 419/80 Rudolf Hess Case* (1980) BVerfGE 55 p. 349; 90 ILR 386; *Trawnik v Lennox* [1985] 2 All ER 368.

Commonwealth State will engage the responsibility of that State and not of the United Kingdom. For these reasons, it is provisionally recommended that article 9 be retained, as it applies to State organs. This recommendation may, however, need to be revisited in the light of the examination of some of the broader issues of responsibility for joint State action which are raised, *inter alia*, by articles 27 and 28.

234. As far as international organizations are concerned, the position is more difficult. There are few (if any) convincing cases of an organ of an international organization being "placed at the disposal" of States in the sense of article 9. Any such cases are bound to raise broader questions of the possible responsibility of the member States, as well as the receiving State, for the conduct of the organ. These questions are also implicated by article 13 of the draft articles, to be discussed shortly.[127] In any event, however, the difficulties raised by article 9 in relation to international organizations outweigh the very limited clarification that article offers. It is recommended that the reference to international organizations in article 9 be deleted.

(f) Article10: Attribution to the State of the conduct of organs acting outside their competence or contrary to instructions concerning their activity

235. Article 10 deals with the important question of unauthorized or *ultra vires* acts. It provides that:

> "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."

236. The commentary to article 10 usefully records the development of the modern rule, and asserts categorically that "[t]here is no exception to this rule even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ".[128] It goes on to discuss the central problem of distinguishing, on the one hand, cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, and, on the other hand, cases where their conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. This problem is dealt with below.

Comments of Governments on article 10

237. No Government comments have been made on article 10, and this appears to reflect very general if not universal agreement with the modern rule. Indeed it could hardly be otherwise, consistent with article 4.

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[127] See paras. 256-262 below.

[128] Commentary to article 10, para. 1.

Article 10 and the problem of distinguishing official from "private" conduct

238. The principle stated in article 10 is thus undoubted and clearly must be retained.[129] As noted, there is however a problem in distinguishing *ultra vires* conduct of officials from conduct which is wholly outside the scope of any official capacity, and is to be assimilated to private conduct. In the draft articles at present that problem is elided.[130] Both articles 5 and 7 require that the organ or entity have acted "in that capacity in the case in question", but no further definition is offered of the notion of "capacity". Article 10 again uses the phrase without further specification.

239. The matter has been extensively discussed in arbitral awards and in the literature.[131] In its commentary to article 10 the Commission cites with apparent approval the following article adopted at the Hague Codification Conference of 1930:

> "International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed *under cover of their official character*, if the acts contravene the international obligations of the State."[132]

This language derives from the decision of the French-Mexican Claims Commission in the *Caire* case, again cited in the commentary with approval as a "precise, detailed and virtually definitive formulation of the principles applicable".[133] The *Caire* case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held ...

> "that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status."

Presiding Commissioner Verzijl likewise referred to the two officials as having "availed [themselves] of [their] official status".[134]

240. In the first phase of the Commission's work on this topic, Special Rapporteur García Amador proposed the following language:

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[129] It is confirmed, for example, in article 91 of 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides that: "A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces." This would include acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility": International Committee of the Red Cross, *Commentary on the Additional Protocols* (1987) at pp. 1051-1053. See also the *Velásquez Rodríguez Case*, IACHR Ser. C No. 4 (1989) at para. 170; 95 International Law Reports 232 at p. 296: "This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."

[130] As pointed out by Brownlie, *State Responsibility*, Part I (1983) at pp. 147-148.

[131] See ibid., pp. 145-150.

[132] League of Nations, *Acts of the Conference for the Codification of International Law*, held at The Hague from 13 March to 12 April 1930, Vol. IV, *Minutes of the Third Committee* (document C.351(c)M.145(c).1930.V), p. 238 (emphasis added), cited in the commentary to article 10, para. 9.

[133] Commentary to article 10, para. 14.

[134] (1929) 5 United Nations Reports of International Arbitral Awards 1117 at pp. 529 *et seq.* (translated from French).

> "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence *but purported to be acting in their official capacity*".[135]

241. The problem has continued to arise. For example, in *Yeager v. Islamic Republic of Iran*, the claimant complained of being unlawfully required to pay extra money to an Iran Air agent to get a prepaid air ticket issued, and of being robbed at the airport by Revolutionary Guards "performing the functions of customs, immigration and security officers". Iran Air was a wholly State-owned airline, whereas at the time, the Revolutionary Guards had not yet been formally incorporated as an organ of the State. Nonetheless, the Iran-United States Claims Tribunal distinguished between the two cases, holding that the Islamic Republic of Iran was not responsible for the apparently isolated act of the Iran Air agent, but that it was responsible for the later robbery.[136] In another case, the Tribunal posed the question in terms of whether it had been shown that the conduct had been "carried out by persons cloaked with governmental authority".[137]

242. The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if there is evidence that the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and taken steps to prevent it. However, the distinction between the two situations still needs to be made for individual cases of outrageous conduct on the part of persons who are officials, and the line drawn by the authorities cited above seems a reasonable one. In the words of the commentary ...

> "In international law, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appear to be acting effectively in its name."[138]

243. The remaining question is whether the actual language of articles 5, 7 and 10 should be altered so as to reflect more clearly the principle of "apparent capacity" reflected in the commentary and in the cases. On the one hand, it may seem difficult to say that a customs official who acts outrageously, unlawfully and for private gain, but while on duty and using the instruments of office, is still acting in his "capacity" as an organ. This would suggest that a formulation such as "acting in or under cover of that official capacity" be adopted in article 10. On the other hand, article 10 already makes it clear that the notion of "official capacity" is a specialized one, and the commentary to article 10 can be reinforced to the same effect. The question is finely balanced, but the absence of any comments or proposals for change on the part of Governments perhaps tilts the balance in favour of the existing text. It is, however, proposed that the concluding phrase in article 10 be amended to read "even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise". This is clearer, as well as consistent with the proposal already made to delete the reference to internal law in article 5.[139]

(g) Article11: Conduct of persons not acting on behalf of the State

244. Article 11 is the first of the "negative attribution" articles, to which reference has already been made.[140] It provides that:

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[135] *Yearbook* ... 1961, Vol. II, document A/CN.4/134 and Add.1, p. 52, para. 2 of article 12.

[136] (1987) 17 Iran-United States Claims Tribunal 92.

[137] *Petrolane Inc. v Islamic Republic of Iran* 1991 27 Iran-United States Claims Tribunal 64 at p. 92.

[138] Commentary to article 10, para. 17.

[139] See para. 167 above.

[140] See para. 146 above.

> 1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
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> 2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

245. The commentary to article 11 notes that it "confirms the rules laid down in the preceding articles", and that it is a merely "negative statement".[141] Although "[t]he acts of private persons or of persons acting, in the case under consideration, in a private capacity are in no circumstances attributable to the State", this "strictly negative conclusion" does not mean that the State cannot be responsible for those acts, for example, if State organs breach an obligation to prevent private conduct in some respect. Indeed, States have "often" been held responsible for such acts.[142] There follows a useful analysis of the earlier practice, and in particular of the *Tellini* case of 1923, which definitively established the modern rule.[143] The commentary concludes that:

> "(a) In accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve the responsibility of the State. This conclusion is valid irrespective of the circumstances in which the private person acts and of the interests affected by his conduct; (b) although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned. In the view of the Commission, the rule which emerges from the application of the criteria outlined above fully meets the needs of contemporary international life and does not require to be altered."[144]

Comments of Governments on article 11

246. The United States expresses the view that article 11 "adds nothing to the draft ... The duplication of rules provides a tribunal with an additional, if not troublesome, question of which rule to apply in a given situation and whether they differ in application. Article 11 should be deleted."[145] Similar misgivings were expressed by Chile in its comments of 1979: it described article 11 as "an almost pedantic clarification" and suggested that its provisions "might well have been combined with those of article 8(a)".[146]

The difficulty with article 11

247. As these comments suggest, article 11 presents a difficulty. At one level, it records the outcome of an important evolution in general international law away from notions of the "vicarious liability" of the State for the acts of its nationals, and towards a clear distinction in principle between the State and the non-State domains. It also provides apparent security to States that they will not be held responsible for the acts of private parties. On the other hand, as a matter of law, and in the context of the draft articles as a

[141] Commentary to article 11, para. 1.

[142] Ibid., paras. 3-5.

[143] Report of the Committee of Jurists, League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524, as adopted unanimously by the Council of the League on 13 March 1924: ibid. p. 524.

[144] Commentary to article 11, para. 35.

[145] A/CN.4/488, p. 41.

[146] *Yearbook* ... 1980, Vol. II (Part One), p. 97.

whole, that security is illusory, because article 11 lacks any independent content. On analysis, it says nothing more than that the conduct of private individuals or groups is not attributable to the State unless that conduct is attributable under other provisions of chapter II. This is both circular and potentially misleading, because in any given situation of injury caused by private individuals, it tends to focus on the wrong question. The issue in such cases is not whether the acts of private individuals as such are attributable to the State (they are not), but rather, what is the extent of the obligation of the State to prevent or respond to those acts. In short, not only is article 11 not a rule of attribution, it does not have the slightest impact, even in terms of the burden or proof, on the application of the other provisions of chapter II which are rules of attribution. If, under any of those provisions, conduct is attributable to the State, then article 11 has no application. If the conduct is not so attributable, then article 11 has no effect. There is no third possibility.

Tentative conclusion

248. For these reasons, the Special Rapporteur tentatively proposes that article 11 be deleted. The problem is, however, that to delete it might imply, *a contrario*, a move back to discredited notions of "vicarious responsibility" for the acts of private persons, and may give rise to concern on the part of some States. To a considerable extent, this can be avoided by appropriate discussion in the commentary to other articles of part two (and the substance of the commentary to article 11 should be retained). In addition, however, it will be suggested that appropriate language can be inserted in a proposed new article which will address any residual concerns.[147]

(h) Article 12: Conduct of organs of another State

249. Article 12 provides that:

> 1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

250. The commentary to article 12 recounts the many cases where organs of one State act as such on the territory of another State, and gives as examples of problems arising from such action a number of incidents from the 1950s, all involving the then Soviet Union in one capacity of another.[148] It notes however that in none of those incidents was the mere fact that they occurred on the territory of a State taken to be a sufficient basis for the responsibility of that State. Surprisingly, the commentary does not mention the *Corfu Channel* case.

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[147] See para. 286 below.

[148] These were: Soviet complaints to the Federal Republic of Germany at meteorological balloons launched on its territory by the United States which strayed over the border, and a protest by the Federal Republic of Germany to Austria about the Austrian Foreign Minister's presence at a speech in Vienna by Mr. Kruschev during which he insulted the Federal Republic of Germany: see commentary to article 12, paras. 6-7.

Comments of Governments on article 12

251. No comments were made on article 12 as such.[149]

The context of article 12

252. Article 12 has to be considered in the light of the provisions of chapter IV of part one, which deal with the implication of a State in the internationally wrongful act of another State. Article 27 deals with aid or assistance by one State in the commission of an internationally wrongful act of another State. Article 28 deals with situations where one State is subject to the "direction or control" of another in committing a wrongful act, and with situations of actual coercion. By comparison with article 12, these cases are much more likely to generate claims of responsibility; indeed it is difficult to see on what basis the mere fact that one State acts on the territory of another could, without more, give rise to the responsibility of the latter.[150] In other words, the problem with article 12 (as with article 11) is that it addresses a "non-problem", while at the same time there is a real problem which it does not address.

Territory and responsibility

253. In short, the occurrence of conduct of one State on the territory of another is not, as such and of itself, a sufficient basis for the attribution of the conduct to the latter State. The leading authority is the decision of the International Court in the *Corfu Channel* case. In that case, mines had recently been laid in the Corfu Channel within Albanian territorial waters, but it was not shown that Albania was actually responsible for laying them.[151] The question was whether Albania was responsible for damage to British ships which had struck the mines. The Court said:

> "It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called on to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and its authors. The State may, up to a point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. *This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.*"[152]

The Court went on to hold Albania fully responsible for the damage, on the basis that Albania knew or should have known of the presence of the mines but failed to warn the United Kingdom: its obligation to warn was based, *inter alia*, on "every State's obligation

[149] For general comments on the issue of the "negative attribution" clauses see para. 157 above.

[150] The special case of a State organ placed at the disposal of another State is dealt with in article 9, discussed in paras. 222-234 above. The special provision in article 9 clearly implies that article 12 is unnecessary.

[151] In fact, they had been laid by Yugoslavia, as was suspected at the time.

[152] *ICJ Reports* 1949, p. 4 at p. 18 (emphasis added).

not to allow knowingly its territory to be used for acts contrary to the rights of other States".[153] In summary, the Court held that:

◊ the territorial State could be responsible for the conduct of another State on its territory, even if it was not shown to be complicit in that conduct;

◊ the mere occurrence of a wrongful act on the territory of a State did not, however, involve prima facie responsibility, nor even shift the burden of proof; but

◊ as a matter of substance, the occurrence of a wrongful act on the territory of a State was *relevant* to responsibility, because a State must not knowingly allow its territory to be used for acts contrary to the rights of other States, and

◊ as a matter of evidence, the location of the act was relevant in that, without shifting the burden of proof, it might provide a basis for an inference that the territorial State knew of the situation and allowed it to occur or to continue.

254. By comparison with these findings, the content of article 12 can be seen to raise difficulties. On the one hand, article 12 states a truism, that the location of wrongful conduct on the territory of a State is not a sufficient basis for responsibility.[154] If that is all article 12 says, its usefulness is extremely limited, since no one suggests the contrary. But the problem is that article 12 might be understood to imply that the location of a conduct of State B on the territory of State A is legally irrelevant so far as the responsibility of State A is concerned, and this is certainly not true. The Court in the *Corfu Channel* case treated location as highly relevant.

Recommendation

255. Article 12 touches on a much broader field of the combined action of States, which is dealt with to some extent in chapter IV and which may need further elaboration. But for essentially the same reasons as for article 11, article 12 adds little or nothing as a statement of the law of attribution,[155] and it has the further disadvantages analysed above. It is recommended that it be deleted. Elements of the commentary can be included in the commentary to article 9.

(i) Article 13: Conduct of organs of an international organization

256. Article 13 provides that:

> The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

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[153] Ibid., p. 22.

[154] Nor is it a *necessary* basis: a State can be responsible for its conduct in the de facto occupation or administration of territory not its own. As the Court said in the *Namibia Opinion*, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States": *ICJ Reports* 1971, p. 16 at p. 54. Earlier in the same paragraph the Court had been discussing issues of State responsibility; the reference to "liability" in the English version may have been a slip. The European Court of Human Rights has strongly affirmed the same principle in *Loizidou v Turkey (Preliminary Objections)* ECHR Ser. A Vol. 310 (1995) at para. 62; *Loizidou v Turkey (Merits)* ECHR Ser. A Vol. 707 (1996) at para. 52. Thus, even since article 12 was proposed, the link between territoriality and responsibility has been further attenuated.

[155] It is significant that the two precedents for article 12 cited in the commentary (para. 8) are both primary rules, not rules of attribution.

257. The commentary points out that, unlike States, international organizations lack territory and always act on the territory of a State, usually though not invariably with the consent of that State.[156] It reviews the limited experience of claims by States against international organizations, noting the absence of any suggestion that the host State is liable for such acts.[157] It stresses that "the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States" and disclaims any intention to deal with the former subject, or with the subject of the responsibility of member States for the acts of international organizations.[158] It explains that article 13 does not repeat the savings clause contained in the other three negative attribution articles, because of a reluctance "to include in the draft any provision which might suggest the idea that the action of an international organization is subject to the controlling authority of the State in whose territory the organization is called upon to function".[159] At the same time it notes that in certain circumstances a State might become responsible for the conduct of an international organization on its territory, for example, as a result of joint action with the organization.

Comments of Government on article 13

258. As noted, a number of Governments raised issues about attribution of acts of international organizations in the context of article 9. No comments related specifically to article 13.

Responsibility of States for the conduct of international organizations

259. Over and above the problem of the "negative attribution" clauses, already discussed, article 13 raises several difficulties:

(a) The irrelevance of location

260. A similar comment applies here to the issue of the location of conduct as it does in relation to article 12, but the problem of the *a contrario* implication which might appear to flow from the language of article 13 is greater. As we have seen, the fact of a State acting on the territory of another State is legally relevant, although it is by no means sufficient of itself to attract the responsibility of the latter.[160] But international organizations always act, as it were, on the territory of a "foreign" State. Even in relation to the host State, with which it has a special relationship, an international organization is still legally an entirely distinct entity, and the host State cannot be expected to assume any special responsibility for its conduct or its debts. Moreover, as the commentary notes, there is a principle of the independence of international organizations, different and quite possibly stronger than the position that arises when one State acts on the territory of another.[161] For these reasons, the fact that an international organization has acted on the territory of a State would appear to be entirely neutral, so far as concerns the responsibility of that State under international law

[156] Commentary to article 13, para. 2.

[157] Ibid., paras. 3-4.

[158] Ibid., paras. 8-9.

[159] Ibid., para. 13.

[160] See para. 253 above for the analysis of the *Corfu Channel* case.

[161] For example, the principle of the immunity of an international organization from the jurisdiction of the courts of a territorial State is more extensive than the immunity of a foreign State would be. In part, this may be a historical accident, but in part at least it reflects a functional difference between States and international organizations.

for the acts of the organization. But if so, for article 13 to single out that neutral factor as a basis for non-attribution is extremely odd.

(b) The problem of substance

261. There is a broader question of attribution to a state of the conduct of international organizations, which has acquired much greater significance since the adoption of article 13, given the controversies, *inter alia,* over the International Tin Council[162] and the Arab Organization for Industrialization.[163] The most detailed study of that problem which takes these developments into account is that of the *Institut de Droit International*, which produced a carefully considered resolution in 1995.[164] That resolution does not mention the location of the organization or of its activities as a relevant factor in determining State responsibility for its acts. Indeed, article 6 of the resolution, which lists a number of factors which are *not* to be taken into account for that purpose, does not mention territorial location. Evidently it was thought completely irrelevant.

Recommendation

262. The responsibility of States for the acts of international organizations needs to be treated in its own right, in the context of the broader range of issues relating to responsibility for the acts of international organizations. As a statement of the law of attribution, article 13 raises awkward *a contrario* issues without resolving them in any way. It should be deleted. Instead, a savings clause should be inserted, reserving any question of the responsibility under international law of an international organization or of any State for the acts of an international organization.[165] Elements of the commentary to article 13 can be included in the commentary to that savings clause.

(j) Article 14: Conduct of organs of an insurrectional movement/Article 15: Attribution to the State of the act of an insurrectional movement which becomes the new Government of a State or which results in the formation of a new State

263. The position of "insurrectional movements" is dealt with in two articles, which reflects the substantial historical importance of the problem and the considerable bulk of earlier arbitral jurisprudence. Article 14 is the "negative" attribution clause, article 15 the affirmative one. It is convenient to deal with them together.

264. Article 14 provides that:

> 1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

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[162] *J. H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 AC 418 (England, House of Lords), 81 International Law Reports 669; *Maclaine Watson & Co Ltd. v Council and Commission of the European Communities* [1990] 1 ECR 1797 (ECJ).

[163] *Westland Helicopters Ltd. v Arab Organization for Industrialization* (ICC Award, 1985) 80 International Law Reports 595; *Arab Organization for Industrialization v Westland Helicopters Ltd.* (1988) 80 International Law Reports 622 (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v Arab Organization for Industrialization* [1995] QB 282; 108 International Law Reports 564 (England, High Court).

[164] (1996) 66-II *Annuaire de l'Institut de Droit International* 444. For the *travaux* see (1995) 66-I *Annuaire de l'Institut de Droit International* 251.

[165] For the parallel recommendation to delete references to international organizations in article 9, see para. 234 above.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

265. Article 15 provides that:

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

266. In its commentary to article 14, the Commission notes that, once an organized insurrectional movement comes into existence as a matter of fact, it will rarely if ever be possible to impute responsibility to the State, since the movement will by then be "entirely beyond its control".[166] After analysing the extensive arbitral jurisprudence[167] diplomatic practice,[168] and the literature,[169] it affirms strongly that the State on whose territory the insurrectional movement is located is not responsible for the latter's conduct, unless in very special circumstances where the State should have acted to prevent the harm. That rule is stated in categorical terms; in particular it is denied that the State is responsible for or is bound to respect "routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control".[170] On the other hand, the insurrectional movement itself may be held responsible for its own acts.[171]

267. The commentary explains the two rules set out in article 15 on the basis of the organizational continuity of an insurrectional movement which succeeds in displacing the previous government of the State or even in forming a new State on part of its territory.[172] This has nothing to do with State succession; in the former case there is no succession of States, and in the latter the rule of continuity applies whether or not the predecessor State was responsible for the conduct itself (under article 14, it will almost always not be).[173] Thus it is not clear what the systematic or structural basis for responsibility is, but the earlier jurisprudence and doctrine, at least, firmly support the two rules set out in article 15.[174]

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166 Commentary to article 14, para. 4.

167 Ibid., paras. 12-18.

168 Ibid., paras. 19-23.

169 Ibid., paras. 24-27.

170 Ibid., para. 26.

171 Ibid., para. 28, with reference to some older precedents.

172 Commentary to article 15, para. 2-6. Although organizational continuity is given as the justification, it is also said that the rule extends "to the case of a coalition government formed following an agreement between the 'legitimate' authorities and the leaders of the revolutionary movement": ibid., para. 17. It is doubtful how far this principle should be pressed in cases of governments of national reconciliation. A State should not be made responsible for the acts of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. In this respect, the commentary needs some qualification.

173 Ibid., para. 8.

174 Ibid., paras. 9-16. Only one case of practice is cited subsequent to 1930. For an analysis of doctrine and codification attempts see ibid., paras. 18-19.

268. In formulating both the "negative attribution" rule in article 14 and the positive rule in article 15, the Commission made "no distinction between ... different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment as the Government, despite the possible importance of such distinctions in other contexts".[175]

Comments of Governments on articles 14 and 15

269. Austria remarks that:

> "The issue of conduct of organs of an insurrectional movement contained in articles 14 and 15 leaves considerable doubt and requires further consideration. This pertains in particular to Art. 14 para. 2 and 15 para. 1. The relationship between the first and the second sentence of Art. 15 para. 1 should for instance be re-examined in the light of the experience gained in Eastern Europe following the breakdown of the Iron Curtain and other instances of civil unrest."[176]

In an earlier comment, Austria had noted that article 14 did not expressly deal with "the case of an insurrectional movement, *recognized by foreign States as a local de facto government*, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central government", and had called for clarification.[177]

270. France proposes new wording for article 14, establishing a presumption of responsibility subject to exoneration in the event of *force majeure*, etc., combined with the deletion of paragraphs 2 and 3 whose scope is "singularly unclear". It thus proposes an entirely new formulation in the following terms:

> "The conduct of an organ or agent of an insurrectional movement in the territory of a State or in any other territory under its jurisdiction shall not be considered as an act of that State if:
>
> (a) the State in question establishes that the act is attributable to the insurrectional movement; and
>
> (b) the State in question establishes that it exercised the functions pertaining to its territorial jurisdiction over the territories concerned in a lawful manner."[178]

271. The United Kingdom notes that:

> "It is desirable that a new government should not be able to escape international responsibility for the acts that brought it to power, especially as there is a particular likelihood of injury to foreign States and nationals during an insurrection. On the other hand, to entitle ... successful insurrectionists to consent to departures from legal obligations owed to their national State might be thought to promote the non-observance of such obligations at a critical juncture for the State, and even to encourage intervention by third States in its internal affairs. It might, therefore, be thought preferable, in the interest of stability, to adopt the position that only the incumbent government may consent to departures from legal obligations ..."[179]

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[175] Ibid., para. 20.
[176] A/CN.4/488, pp. 45-46.
[177] Yearbook ... 1980, Vol. II (Part One), p. 92.
[178] A/CN.4/488, p. 45.
[179] A/CN.4/488, p. 81.

This comment goes not so much to article 15 as to the question of whether or in what circumstances the consent given by an insurrectional movement may bind the State for the purpose of article 30. It will accordingly be considered when discussing that article.

The definition of "insurrectional movement"

272. The commentary declines to attempt any definition of an "insurrectional movement", on the ground that this is a matter for the international law of personality rather than of responsibility.[180] It does, however, note that insurrectional movements are intended to be covered whether they are based on the territory of the "target" State or on the territory of a third State.[181] This calls for several remarks.

273. First of all, the insurrectional movements considered in the earlier cases were by no means all at a level which might have entailed their having international personality as belligerents, and subsequent developments have done little to confirm the concept of the legal personality of belligerent forces in general. For example, recognition of belligerency in internal armed conflict is in virtual desuetude. Instead the threshold for the application of the laws of armed conflict contained in Protocol II of 1977 may be taken as a guide. Article 1, paragraph 1 refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character" (article 1, para. 2). This definition of "dissident armed forces" would appear to reflect, in the context of the Protocols, the essential idea of an "insurrectional movement", but even a movement which clearly possessed all the characteristics listed in article 1, paragraph 2 would not necessarily be regarded as having international legal personality. Moreover, if the rationale for the rule of attribution in article 15 is one of institutional continuity and of the continuing responsibility of the entities concerned for their own acts while they were in armed opposition, there is no reason why it should be limited to situations where the insurrectional movement is recognized as having legal personality.

274. Secondly, the 1977 Protocols make a sharp distinction between "dissident" groups covered by Protocol II and national liberation movements covered by Protocol I. The latter are defined by article 1, paragraph 4 as engaged in a legitimate struggle for self-determination.[182] It has been objected that articles 14 and 15 fail to distinguish between the two cases, but for the purposes of the law of attribution it is not clear that such a distinction should be made.[183] Whether particular conduct is attributable to a State or other entity, and whether there has been a breach of an obligation are different questions, and the distinctions between Protocols I and II may be relevant to the latter.[184] But that provides no rationale for the differential treatment of different categories of insurrectional movement for the purposes of chapter II. For these reasons, it should be irrelevant to the application

[180] Commentary to article 14, para. 5.

[181] Commentary to article 15, para. 29.

[182] See generally H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

[183] See H. Atlam, "National Liberation Movements and International Responsibility" in B. Simma and S. Spinedi (eds.), *United Nations Codification of State Responsibility* (1987) 35.

[184] Under article 1 (4) of Protocol I, national liberation movements are subject to higher standards of conduct and responsibility than are dissident armed forces covered by article 1 (1) of Protocol II.

of the rules stated in articles 14 and 15 whether and to what extent the insurrectional movement has international legal personality.

The substantive rules reflected in articles 14 and 15

275. Turning to the substance of the rules stated in the two articles, the first point to note is that article 14, paragraph 3 deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. It therefore falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary.

276. The basic principle stated in article 14 is well established, as the authorities cited in the commentary show. It is true that the possibility of the State being held responsible independently for the acts of insurrectional movements remains, but this would of course be true in any event, since the "positive attribution" articles are cumulative in their effect; there is no need to state this specifically in article 14, paragraph 2.[185] That leaves article 14 (1) as an isolated "negative attribution" clause. For the reasons already given, such provisions are unnecessary and undesirable within the framework of article 3 and chapter II.[186]

277. The few judicial decisions on the issues presented by article 15 are inconsistent. In *Minister of Defence, Namibia v Mwandinghi*, the High Court of Namibia had to interpret a provision of the new Constitution accepting responsibility for "anything done" by the predecessor administration of South Africa. The question was whether this made Namibia responsible for delicts committed by the South African armed forces. The Court held that it did, on the basis of a presumption that the acquired right of the claimant to damages in pending proceedings, a right which existed immediately prior to independence, should not be negated, especially having regard to the new State's policy of general continuity. In the course of a decision essentially founded on the interpretation of the Namibian Constitution, the Court nonetheless expressed the view that, under article 15, "the new government inherits responsibility for the acts committed by the previous organs of the State".[187] With all due respect, this confuses the situations covered by paragraphs 1 and 2. Namibia, as a new State created as the result, *inter alia*, of the actions of the South West Africa People's Organization, a recognized national liberation movement, was not responsible for the conduct of South Africa in respect of its territory. That it assumed such a responsibility attests to its concern for individual rights, but it was not required by the principles of article 15.

278. At the other extreme is a decision of the High Court of Uganda in *44123 Ontario Ltd. v Crispus Kiyonga*. That case concerned a contract made by a Canadian company with the National Resistance Movement at a time when the latter was an "insurrectional movement"; it later became the Government, but denied its liability to perform the remainder of the contract, although a substantial performance bond was returned to the company. Without any reference to international law or to article 15, the Court rejected the claim. It said, *inter alia*, that "at the time of the contract the Republic of Uganda had a well established

[185] France's proposed version of article 14 (above, para. 270) fails to take account of the distinction between attribution and breach of obligation, and appears to specify a primary rule. As will be seen, however, the structure proposed by France is partly adopted in article 15: see para. 280 below.

[186] See paras. 146, 157 above.

[187] 1992 (2) SA 355 at pp. 359-360; 91 International Law Reports 341 at p. 361.

government and therefore there cannot have been two governments contending for power whose acts must be recognized as valid".[188]

Conclusion

279. Despite inconsistencies such as these, it should be noted that the two positive attribution rules in article 15 seem to be accepted, and to strike a fair balance *at the level of attribution* in terms of the conflicting interests involved. It is true that there are continuing difficulties of rationalization, but there has so far been no suggestion in government comments or in the literature that the substantive rules should be deleted: if anything the proposals are for reinforcement. It should be stressed, however, that the rules of attribution in the law of state responsibility have a limited function, and are without prejudice to questions of the validity and novation of contracts under their proper law, or to any question of State succession.[189]

280. It is suggested, therefore, that the essential principles stated in article 14, paragraph 1 and article 15 paragraphs 1 and 2 should be restated in a single article. Despite the difficulties with negative attribution clauses standing alone, it seems desirable to specify article 15 in the form of a negative rule subject to certain exceptions: this avoids the problem of circularity and will provide some assurance to Governments that they will not be held generally responsible for the acts of insurrectional groups.[190]

(k) Subsequent adoption of conduct by a State

281. All the bases for attribution covered in chapter II (with the exception of the conduct of insurrectional movements under article 15) assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the allegedly wrongful conduct. But that is not a necessary prerequisite to responsibility. A State might subsequently adopt or ratify conduct not otherwise attributable to it; if so, there is no reason why it should not be treated as responsible for the conduct. Adoption or ratification might be expressed or might be inferred from the conduct of the State in question. This additional possibility needs to be considered.

The Lighthouses Arbitration

282. There were, in fact, examples of this in judicial decisions and State practice before the adoption of Chapter II. For example in the *Lighthouses Arbitration*, an arbitral tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when it was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island ..."[191] It is no accident that this was a case of State succession. There is a widely held view that a new State does not, in general, succeed to any State responsibility of the

[188] (1992) 11 Kampala LR 14 at p. 20; 103 International Law Reports 259 at p. 266. It should be noted that the Government had relied on a number of other legal defences potentially available under the proper law of the contract.

[189] Questions of State succession may be raised by the International Court's reservation with respect to the routine administrative acts of South Africa in the *Namibia Opinion ICJ Reports* 1971, p. 16 at para. 125.

[190] For the proposed formulation see below, para. 287 and notes.

[191] (1956) 12 United Nations Report of International Arbitral Awards 160 at p. 198; 23 International Law Reports 81 at p. 92.

predecessor State with respect to its territory.[192] But if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for the wrongful act.

The Diplomatic and Consular Staff case

283. This was also found to be the case, outside the context of State succession, in *United States Diplomatic and Consular Staff in Tehran*.[193] There the Court drew a clear distinction between the legal situation immediately following the seizure of the United States Embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation they had created. In the words of the Court:

> "The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been 'done by our nation' ..."[194]

It is not clear from this passage whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the State of the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. In fact, it made little difference which position was taken, since the Islamic Republic of Iran was held responsible in relation to the earlier period on a different legal basis, viz, its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[195] But circumstances can be envisaged in which no such prior responsibility could have existed, for example, where the State in question adopted the wrongful conduct as soon as it became aware of it, or as soon as it assumed control over the territory concerned. If the adoption is unequivocal and unqualified (as was the statement of the Iranian Minister for Foreign Affairs, quoted by the Court in the passage above), there is good reason to give it retroactive effect, and this is what the Tribunal did in the *Lighthouses Arbitration*.[196] This has the desirable consequence of allowing the injured State to obtain reparation in respect of the whole transaction or event. It is also consistent with the position established by Article 15 for insurrectional movements.

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[192] See D. P. O'Connell, *State Succession in Municipal and International Law* (1967) vol. 1, p. 482.

[193] *ICJ Reports* 1980, p. 3.

[194] Ibid. at p. 35, para. 74.

[195] Ibid. at pp. 31-33.

[196] (1956) 12 Report of International Arbitral Awards 160 at pp. 197-8; 23 International Law Reports 81 at pp. 91-92.

Recommendation

284. For these reasons, the draft Articles should contain a provision stating that conduct not otherwise attributable to a State is so attributable if and to the extent that the conduct is subsequently adopted by that State. In formulating such a provision, it is necessary to draw a distinction between the mere approval of a situation and its actual adoption. In international controversies, States may take positions on the desirability of certain conduct, positions which may amount to "approval" or "endorsement" in some general sense but which clearly do not involve any assumption of responsibility. In the *Diplomatic and Consular Staff* case, the Court used such phrases as "approval", "endorsement", "the seal of official governmental approval", "the decision to perpetuate [the situation]", and in the context of that case these terms were sufficient for the purpose. As a general criterion, however, the notion of "approval" or "endorsement" is too wide. Thus, for the purposes of article 27 ("Aid or assistance by a State to another State for the commission of an internationally wrongful act"), it is clear that mere approval or endorsement by one State of the unlawful conduct of another is not a sufficient basis for the responsibility of the former. It is suggested that the proposed provision use the language of "adoption", which already appears in the literature[197] and which carries the idea that the conduct is acknowledged by the State as, in effect, its own conduct.[198] The commentary should make it clear that adoption or acknowledgment must be unequivocal.[199]

285. It should be stressed that the proposed rule is one of attribution only. In respect of conduct which has been adopted, it will always be necessary to consider whether the conduct contravenes the international obligations of the adopting State at the relevant time. The question of the complicity of one State in the wrongful conduct of another is dealt with in chapter IV of part one. For the purposes of adoption of conduct, the international obligations of the adopting State should be the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct was not directly regulated by international law at all. By the same token, a State which adopts or acknowledges conduct which is lawful in terms of its own international obligations, would not thereby assume responsibility for the unlawful conduct of any other person or entity. In such cases, it would need to go further and clearly assume the responsibility to pay compensation.

286. As to the location of the proposed article, since it is a supplementary basis of responsibility, it is suggested that it be included as article 15 *bis*. The proposed article can make it clear that except in the case of adoption, or other cases covered by the preceding articles, conduct is not attributable to the State, and this can be suitably reinforced in the commentary. In this way the proposed article 15 bis can also perform the function of the former article 11.[200]

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[197] See, e g., I. Brownlie, *State Responsibility. Part I* (1983) pp. 157-158, 161.

[198] Although the term "ratification" is sometimes used in this context, it should be avoided because of its formal connotations in the law of treaties and in the constitutional law of many States. In the context of State responsibility, adoption of conduct may be informal and inferred from conduct.

[199] Thus in the *Lighthouses Arbitration*, Greece was held not to be responsible for a completed violation of the claimant's rights, attributable to the autonomous Government of Crete, even though it has previously indicated that it was disposed to pay some compensation: (1956) 12 Report of International Arbitral Awards 160 at p. 196; 23 International Law Reports 81 at p. 89.

[200] See 244-248 above, where the deletion of article 11 is proposed.